Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1280

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, LOCAL NO. 720,
Petitioner,

vs.

WILLIAM J. USERY, SECRETARY OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ

I. An Important Question of Federal Law Which Has Not Been But Should Be Decided by This Court is Present in This Case 4

Conclusion 6

TABLE OF AUTHORITIES

Cases

Bell vs. Swift, 283 F.2d 407 (5th Cir. 1960) 5

Chatman vs. American Export Lines, 20 F.R.D. 176 4

G. F. Heaublien Bros. vs. Bushnill Wine and Product Co., 2 F.R.D. 190 4

Hickman vs. Taylor, 329 U.S. 495, 91 L.Ed. 451, 67 S.Ct. 385 (1947) 5

Newell vs. Phillips Petroleum Co., 144 F.2d 338, (10th Cir. 1944) 5

Ronoe vs. Panhandle Eastern Pipe Line Company,
D.C., N.Y., 1952, 12 F.R.D. 257 5

Roviaro vs. United States, 353 U.S. 53,
l L.Ed.2d 639, 77 S.Ct. 623 (1956) 4,5,6

U. S. vs. Hemphill, 369 F.2d 539 (4th Cir. 1966) 4

Federal Statutes

28 U.S.C. §1254(1) 2

29 U.S.C. §411-415 5

29 U.S.C. §482 2

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WILLIAM J. USERY, SECRETARY OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on January 3, 1977, and to which a Petition For Rehearing was denied January 21, 1977.

OPINIONS BELOW

The judgment of the Court of Appeals of January 3, 1977, which is herein sought to be reviewed, is reprinted in separate appendix to this Petition, p. 7. The Order of the United States

District Court for the District of Colorado entered on October 30, 1975, is reproduced in the appendix at p. 12.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1977. Petition For Rehearing was timely filed and denied on January 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

May the government invoke an "informer's privilege" in a civil proceeding under 29 U.S.C. 482 (Landrum-Griffin Act) so as to deprive its opponent of relevant and necessary information to prepare a proper defense.

STATUTORY PROVISIONS INVOLVED

This cause involves the Labor Management Reporting and Disclosure Act of 1959, (Landrum-Griffin Act), 29 U.S.C. 482, which is reproduced at p. 17 of the appendix.

STATEMENT OF THE CASE

This cause was instituted by the Secretary of Labor against Petitioner under the Labor Management Reporting and Disclosure Act (LMRDA) of 1959 (29 U.S.C. 482, et seq.) (Landrum-Griffin Act), seeking an order of the Court requiring a new election of Union officers to be supervised by the Secretary. In the complaint, the government contended that the election of officers of the local Union on June 8, 1974 was improper, in that Union members were not allowed to vote for the candidates of their choice and Union funds were allegedly expended to promote the candidacy of certain members. LMRDA permits

a member of a labor organization who has exhausted the available remedies under the Union constitution to file a complaint with the Secretary of Labor challenging an election of Union officers. The Secretary is empowered to investigate such complaint and if he finds probable cause to believe that a violation has occurred, brings a civil action against the labor organization to set aside the election, and to direct the conduct of a new election under the supervision of the Secretary of Labor. The District Court is empowered to declare the election to be void, and direct the conduct of a new election under the supervision of the Secretary, upon an express finding that a violation of LMRDA may have affected the outcome of the election.

Subsequent to the lodging of the complaint, Petitioner sought to discover the fruits of the government's required factual investigation by propounding written interrogatories. Among other matters sought to be discovered, certain of the interrogatories attempted to discern the name and address of all persons interviewed or contacted or from whom statements were taken, or with whom discussions were had during the investigatory portion of the proceedings. It was also attempted to discover the content of all statements obtained from potential witnesses. The text of the interrogatories propounded is set forth in the appendix herein.

The government objected to answering certain interrogatories claiming an "informant's privilege". Petitioner moved to compel answers and subsequent to hearing, the Court entered an order compelling and directing the Secretary of Labor to answer. The Secretary refused to obey and upon motion, the District Court dismissed the action. Appeal was taken by the Secretary to the United States Court of Appeals for the Tenth Circuit, and on January 3, 1977, that Court reversed the District Court holding that there is an "informant's privilege" which was applicable to this cause but without qualifying the privilege at all.

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT IS PRESENT IN THIS CASE.

The Federal Rules of Civil Procedure as they relate to discovery are based on the concept that whatever would be admissible at a trial is also a relevant subject for discovery. The Courts have frequently held that the purpose of discovery is to ascertain before trial material facts concerning the real issues in dispute, thus saving valuable time at trial. Surprise at a trial should be almost impossible. G. F. Heaublien Bros. vs. Bushnill Wine and Product Co., 2 F.R.D. 190; Chatman vs. American Export Lines, 20 F.R.D. 176. The government in this case below made extensive use of the discovery process and the Union fully complied. This ought to be a two way process. It is our view that inasmuch as this is a civil case, there is no reason why the litigation should be conducted behind a curtain. The government argued and Circuit Court adopted the theory that the government is privileged to withhold from disclosure the identities and statements of persons furnishing information of law violations to law enforcement officers, relying upon Roviaro vs. United States, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1956). The Circuit Court extended the "qualified privilege" recognized to protect the identity of informants in actions under the Fair Labor Standards Act to the LMRDA cases. This is the first decision of any Circuit so extending this doctrine from FLSA cases. We submit this is ill considered, without cause, and if permitted to stand will do irreparable harm to all litigants who must deal with the government under LMRDA. The rationale of FLSA cases is that non-disclosure of complaining employees will protect them from retaliation by employers. U.S. vs. Hemphill, 369 F.2d 539 (4th Cir. 1966). The premise of the Court was that potential reprisal against Union members was justification for extension of the so-called "qualified privilege". This in spite of the guarantees to members of labor organizations set forth under LMRDA. The Circuit Court misconceived the parties' argument and premised its ruling on the value of non-disclosure of the identities of Union members! The interrogatories sought the names and statements of all witnesses interviewed, not just Union members, thus the mantle of secrecy was extended to those persons totally outside the scope of the Union's ability to retaliate. This, although the Union knew full well which members had complained as it was specified in the complaint. The purpose of the Union was to avail itself of the fruits of the investigation to prepare for trial, not to obtain the names of Union members. The Circuit Court ignored 29 U.S.C. §411-415, which is frequently referred to as the "Bill of Rights of Members of Labor Organizations". This Act, as well as the National Labor Relations Act, affords protection from retaliation and retribution to Union members.

Petitioner believes that in a civil cause, no rule of secrecy should obtain, and names of persons having knowledge of relevant facts must be disclosed. Bell vs. Swift, 283 F.2d 407 (5th Cir. 1960); Ronoe vs. Panhandle Eastern Pipe Line Company, D.C., N.Y., 1952, 12 F.R.D. 257. Discovery should not be restrained, but on the contrary should be liberally allowed. This Court has held that mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. Hickman vs. Taylor, 329 U.S. 495, 91 L.Ed. 451, 67 S.Ct. 385 (1947). The discovery process should be accorded a liberal interpretation. Newell vs. Phillips Petroleum Co., 144 F.2d 338 (10th Cir. 1944). Surely government in secret is not the object to be achieved and we do not believe this Court looks favorably upon such conduct. The concept of an informant's privilege is explained by the well known case of Roviaro vs. U.S., supra.

This, although a criminal action, established the determinative test for deciding if privilege will apply. This Court therein indicated that a limitation on the applicability of privilege arises from fundamental requirements of fairness. Where the disclosure of an informant's identity or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way. The trial court in our case applied this test and found that the Petitioner's interest in obtaining the information in question out weighed the government's interest in protecting the information by asserting that it was privileged. The Circuit Court substituted its judgment for the discretion of the trial court. None of the decided cases of which we are aware have awarded an absolute privilege. This decision does so without any real limitations or guidelines. The decision making process as to what is or is not relevant and privileged is transferred from the Court to the government. The doctrine of privilege enunciated in Roviaro, supra, is of interest but it is difficult to see how its application to the LMRDA case can be justified. Where next will the government seek to expand the tentacles of secrecy? Such a weapon is a valuable tool in civil litigation. This is a convenient method for suppressing information favorable to an opponent's case! This is an important question of federal law which has been decided for the first time in any appellate court. This decision will touch hundreds of pending cases and it is submitted should be reviewed.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM J. USERY, Secretary of Labor,	)	
Plaintiff-Appellant,	)	
vs.	)	**No. 76—1055**
LOCAL UNION 720, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL—CIO,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. C. No. 74—M—1144)

Neil H. Koslowe (Rex E. Lee, Assistant Attorney General, James L. Treece, United States Attorney, Leonard Schaitman, Attorney, Department of Justice, Civil Division-Appellate Section, on the brief) for Appellant.

Alan A. Armour (Hoffman, Goldstein, Armour & Lonnquist, P.C., on the brief) for Appellee.

Before SETH, BRIETENSTEIN and McWILLIAMS, Circuit

Judges.

BREITENSTEIN, Circuit Judge.

The question is whether in an enforcement action under the Labor-Management Reporting and Disclosure Act of 1959, LMRDA, 29 U.S.C. § 401 et seq., the Secretary of Labor has a privilege not to reveal the identities and statements of informants. The Secretary objected to certain interrogatories propounded by the defendant Union and asserted that the information sought was privileged. The court overruled the objection and ordered the Secretary to answer. He declined to do so. On the motion of the defendant, the court dismissed the action and the Secretary has appealed. We reverse.

On June 8, 1974, the Union, which is based in Denver, Colorado, had an election of officers. The election was subject to the provisions of Title IV of LMRDA, 29 U.S.C. § 481 et seq. Twelve union members filed a complaint with the Secretary protesting the election. See 29 U.S.C. § 482(a). The Secretary made an investigation, see 29 U.S.C. § 521, and found cause, see 29 U.S.C. § 482(b), to believe that violations of Title IV of the Act has occurred and had not been remedied. He then filed the instant action which seeks nullification of the election and direction of a new election. Section 482(b), 29 U.S.C. confers federal jurisdiction.

The answer of the defendant Union contains admissions and denials and asserts affirmative defenses. The Union submitted interrogatories to the Secretary who answered some and claimed privilege as to others. The answers of the Secretary disclosed that he claimed two violations of LMRDA; (1) "defendant's provision of only one polling place, and the failure to provide absentee ballots, denied members in good standing the right to

vote for candidates of their choice", see 29 U.S.C. § 481(e), and (2) "the expenditure of $492.04 of defendant's funds to promote the candidacy of certain persons", see 29 U.S.C. §481(g).

The Secretary objected to five interrogatories on the ground that they called for privileged information in that answers would disclose the identity of confidential informants. The court overruled the Secretary's objections and ordered him to answer. He declined to do so. On motion of the defendant, the court dismissed the action.

The government is privileged to withhold from disclosure the identities of persons furnishing information of law violations to law enforcement officers. Roviaro v. United States, 353 U.S. 53, 59. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." Ibid. The principle applies in both civil and criminal actions. Westinghouse Electric Corp. v. City of Burlington, Vermont, D.C. Cir., 351 F.2d 762, 769. We have joined four other circuits in recognizing a qualified privilege to protect the identity of informants in actions under the Fair Labor Standards Act, FLSA. See Usery v. Ritter, No. 76-1809, opinion filed simultaneously with this opinion, and cases there cited.

The Union asserts that the decisions under the FLSA are not applicable because they are concerned with employer-employee relationships where the possibility of retaliation is present. Union reprisal against its members is within the realm of possibility. See e.g. Robins v. Schonfeld, S.D.N.Y., 326 F.Supp. 525, 528-529. FLSA proscribes retaliatory acts. See 29 U.S.C. § 215(a). Although LMRDA contains no comparable provision, Union says that the members are adequately protected by the "Bill of Rights of Members of Labor Organizations", 29 U.S.C. §§ 411-415.

Be that as it may, the overriding concern is the public interest in law enforcement. Anonymity of informants encourages communications to law enforcement officers. As said in Roviaro, 353 U.S. at 62: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."

We are aware of no appellate decisions which have considered whether the Secretary is privileged to refuse to identify informants in LMRDA proceedings. Two district court cases have recognized and upheld the privilege. See Wirtz v. International Print. P. & A.U. of N.A., AFL-CIO, E.D.Tenn., 47 F.R.D. 58, and Goldberg v. Machinists, District Lodge 70, D.Kan., 45 CCH Lab. Cas. par. 17,799 at 27,409.

The Union makes much of its rights of discovery under the applicable Federal Rules of Civil Procedure. We recognize those rights. They must be balanced against the privilege claimed by the government. The privilege is not absolute but qualified. See Usery v. Ritter, supra, and cases there cited. The government's interest in confidentiality must be weighed against the defendant's need for disclosure in the preparation of its defense. See Brennan v. Engineered Products, Inc., 8 Cir., 506 F.2d 299, 303.

The proceedings are at the discovery stage. The government is willing to provide information which would not reveal the identities of informants and to make disclosure with regard to informants who waive confidentiality. The government recognizes that at an appropriate time, probably in connection with a pretrial order, it must list its witnesses. The Union states its needs in conclusory and conjectural terms. The issues are simple--whether the Union provided adequate means for its members to express their choices at the election and whether funds of the Union were used to promote the candidacies of particular persons. The facts pertaining to each are within the knowledge of

the Union. Absent extraordinary circumstances not here present, the evidentiary rule recognizing a qualified privilege applies in preliminary proceedings not determinative of the merits of a controversy. See McCray v. Illinois, 386 U.S. 300, 312. We are not presented with any problem arising from the listing of witnesses in a pretrial order.

The failure of the Union to show a substantial need for the requested breach of confidentiality at the discovery stage tips the scales in favor of the government. The trial court's reliance on United States v. Nixon, 418 U.S. 683, is misplaced. That case was concerned with executive privilege arising from the constitutional enumeration and separation of powers. Ibid. at 703. The withholding of an informant's identity is an evidentiary, rather than executive, privilege. See Mitchell v. Bass, 8 Cir., 252 F.2d 513, 516-517. In the case at bar the Secretary claims an evidentiary, not an executive, privilege.

The Union argues that discovery orders are discretionary with the trial court. We agree. The difficulty is that the trial court flatly rejected the government's claim of privilege. It did not balance the government's qualified privilege against the need of the Union at the discovery stage of the proceedings. Failure to recognize the government's qualified privilege and to balance it against the needs of the Union was an abuse of discretion.

Reversed and remanded for further proceedings in the light of this opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 74–M–1144

JOHN T. DUNLOP, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

LOCAL UNION 720, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Defendant.

ORDER OF DISMISSAL

This is an action brought by the Secretary of Labor under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481 et seq. On July 3, 1975, the defendant filed a motion to compel discovery, seeking an order to require the plaintiff to answer certain interrogatories. At a hearing on that motion on August 13, 1975, this Court entered an order compelling and directing that the plaintiff answer the interrogatories, excepting interrogatories numbers 27(h), 27(i), 27(j) and 30. The plaintiff has refused to obey that order. In the opinion of this Court, the subject interrogatories are proper discovery, there is no privilege to withhold the information requested and such information is necessary for preparation of the defense of this action. Upon the conclusion that the appropriate sanction for the refusal to obey the order for discovery under F.R.C.P. 37 is dismissal of this civil action, it is, therefore,

ORDERED that the complaint and this civil action are dismissed, without prejudice.

Done at Denver, Colorado, this 30th day of October, 1975.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

"26. Did plaintiff, by and through his agents, servants and employees contact, interview, take statements from or have a discussion with any person or persons during the course of the investigation described in Paragraph IX of plaintiff's complaint?"

"27. In the event the answer to Interrogatory No. 26 above is in the affirmative, answer the following questions:
(a) What is the name, address and telephone number of each and every person so contacted or interviewed or from whom a statement was taken or with whom a discussion was had?
(b) What is the name and address of the employer of each and every person listed in response to Interrogatory No. 27(a) above?
(c) On what exact and specific date or dates was each such person listed in answer to Interrogatory No. 27(a) above contacted?
(d) Were statements in writing taken or was some recording made or was any other device or method utilized to preserve the statement of any of the persons listed in response to Interrogatory No. 27(a) above?
(e) Was a statement in writing or other means or method used to obtain a statement from all of the persons described in response to Interrogatory No. 27(a) above?
(f) If the answer to Interrogatory No. 27(e) above is in the negative, what is the name of each and every such person from whom no statement in writing was taken?
(g) What is the exact and specific reason no written statement was so obtained from the person or persons listed in response to Interrogatory No. 27(f) above?"

"46. What are the names and addresses of any persons who were contacted, interviewed, or from whom a statement was taken during plaintiff's investigation of the facts surrounding defendant's use of moneys 'to promote the candidacy of

certain persons in the election' as described in Paragraph X of plaintiff's Complaint?"

"47. Which persons listed in response to Interrogatory 46 above, if any, gave written statements to plaintiff?"

"48. What was the basic substance of each conversation had between any of the agents, servants and employees of plaintiff and the persons listed in response to Interrogatory No. 46 above?"

§ 482. Enforcement

(a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization–

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (29 USCS § 481) (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title (29 USCS §§ 481–483) has occured and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title (29 USCS §§ 481–483) and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers. If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401 (29 USCS § 481), or

(2) that the violation of section 401 (29 USCS § 481) may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401 (29 USCS § 481(h)), the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) Review of orders; stay of order directing election. An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal. (Sept. 14, 1959, P. L. 86-257, Title IV, § 402, 73 Stat. 534.)